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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1956

No. 404

WISCONSIN ELECTRIC
POWER COMPANY,

Appellant,

vs.

CITY OF MILWAUKEE,
a Municipal Corporation,

Appellee.

MOTION TO DISMISS

**Appeal from the Supreme Court
of the State of Wisconsin**

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Appeal from the Supreme Court
of the State of Wisconsin

The appellee, City of Milwaukee, pursuant to Rule 16 of the Revised Rules of the Supreme Court of the United States, moves that the appeal herein be dismissed on the grounds:

1. That there is no substantial federal question to be litigated;

2. That the federal question sought to be reviewed was not timely or properly raised or expressly passed on; and

3. That the judgment rests on an adequate non-federal basis.

QUESTION PRESENTED

Does direct appeal to the United States Supreme Court lie in reviewing a judgment based on a decision which decided only the question of whether or not the fact and legal situation was controlled by a previous case from the highest appellate court of that state?

STATEMENT

The City of Milwaukee, pursuant to the Laws of the State of Wisconsin, levied certain special assessments in 1949 and 1950 for the paving, grading and installation of curbs, gutters and sidewalks, water pipes and sewers on certain streets adjacent to the right-of-way owned by the appellant, which right-of-way is used at present for the transmission of electrical power.

The appellant felt itself aggrieved by such special assessments and raised certain questions as to the propriety of those assessments by taking a statutory appeal to the Circuit Court for Milwaukee County. The appellant attempted to raise certain constitutional questions, claiming that it was not notified properly of these assessments, since the notices were by publication only. The city demurred to this complaint and the demurrer was sustained by an order of the Circuit Court. Without pleading further, the appellant then appealed the order of the Circuit Court to the Supreme Court of the State of Wisconsin. The Supreme Court of Wisconsin, by an evenly divided court, one Justice abstaining, found for the defendant City of Milwaukee under the rule. The case was remanded for further proceedings at the Circuit Court level and the appellant then chose to amend its complaint. The city again demurred and the Circuit Court again upheld the demurrer of the city, holding that the

decision of the Supreme Court of Wisconsin on the original complaint was the law of the case and that appellant was merely attempting to have the court reconsider a matter which has been once considered and decided. The court neither decided nor raised any issues concerning the constitutionality of the assessments, nor any of the subsequent proceedings. Judgment was entered sustaining the demurrer and dismissing the amended complaint. The appellant then took its appeal to the Supreme Court of Wisconsin, and the Supreme Court of Wisconsin again affirmed the decision of the Circuit Court, holding that its previous decision was the law of this particular case in view of the fact that the parties were identical and the issues between them were the same.

The two opinions of the Wisconsin Supreme Court are found in the statement as to jurisdiction filed for the appellant on pages 13 through 18 thereof.

ARGUMENT

I.

No federal question nor any question involving the United States Constitution has been properly or timely raised or is before this court on the appeal presented by the appellant.

The appellant here seeks to review the judgment of the Circuit Court for Milwaukee County which was affirmed by the Supreme Court of the State of Wisconsin and reported in *Wisconsin Electric Power Co. v. Milwaukee,* 272 Wis. 575, 76 N.W. (2d) 341.

Neither the Circuit Court for Milwaukee County nor the Supreme Court of the State of Wisconsin resolved

any of the questions attempted to be raised by appellant relating to constitutionality. In the view of the case taken by the Wisconsin courts, there was no constitutional question, the only question being whether the appellant had its case fully litigated in a previous decision of the Supreme Court of the State of Wisconsin. Both the Circuit Court of Milwaukee County and the Supreme Court of Wisconsin held that the appellant had had its day in court and that the decision in *Wisconsin Electric Power Co. v. Milwaukee,* 263 Wis. 111, 56 N.W. (2d) 784, became the law of the case and that appellant in seeking to review it a second time was merely asking for reconsideration of the same issues. Consequently, the only question now before the Supreme Court of the United States is whether the fact situation discussed in the Supreme Court decision reported in *Wisconsin Electric Power Co. v. Milwaukee,* 272 Wis. 575, 76 N.W. (2d) 341, is governed by the previous decision of that court. Neither the Circuit Court for Milwaukee County nor the Supreme Court of the State of Wisconsin discussed any constitutional issue, nor was their decision based in any part upon an issue of constitutionality.

The Supreme Court of the United States has on a number of occasions held that in order to give the court jurisdiction it must appear affirmatively on the face of the record, not only that a federal question was raised, but that it was decided, or that its decision was necessary to the judgment or decree rendered in the case. *Matheson v. Branch Bank of Alabama,* 7 How 260, 12 L.Ed. 692; *Williams v. Kaiser,* 323 U.S. 471, 65 S. Ct. 363, 89 L.Ed. 398.

II.

The decision of the Wisconsin Supreme Court in affirming the judgment of the Circuit Court in and for Milwaukee County rests on an adequate non-federal basis.

The Supreme Court of the State of Wisconsin decided the case reported in *Wisconsin Electric Power Co. v. Milwaukee,* 272 Wis. 575, 76 N.W. (2d) 341, on the rule of the law of the case which prevails in Wisconsin and which was re-affirmed in *Wisconsin Electric Power Co. v. Milwaukee,* 272 Wis. 575, 76 N.W. (2d) 341.

The basic issue decided by the Supreme Court of the State of Wisconsin in *Wisconsin Electric Power Co. v. Milwaukee,* 272 Wis. 575, 76 N.W. (2d) 341, is that the appellant in again bringing the case before the Supreme Court was asking for reconsideration of a case which already had full consideration and which was decided by a previous decision of the Supreme Court. Nothing more could be said by this court or any other court in the United States which could lend more strength or virility to a decision of the highest appellate court of the State of Wisconsin, this being an issue which revolves around the case law prevailing in the State of Wisconsin. The case involves an application of the statutes of the State of Wisconsin and the procedures prevailing in Wisconsin as to appeals and reconsiderations and motions for rehearing. None of these questions have been given to the Congress of the United States for determination under the Constitution of the United States and, consequently, the Congress of the United States in setting up appeal procedures and a court system under the Constitution of the United States could not and has not given the United States Supreme Court jurisdiction to decide questions of this kind.

The Supreme Court of the United States has often denied requests to assume appellate jurisdiction where the case sought to be appealed is a case involving local or general law. See *Allen v. McVeigh,* 107 U.S. 433, 2 S.Ct. 558, 27 L.Ed. 572; *Manhattan L. Ins. Co. v. Cohen,* 234 U.S. 123, 34 S.Ct. 874, 58 L.Ed. 1245; *Ross v. Oregon,* 227 U.S. 150, 33 S.Ct. 220, 57 L.Ed. 458.

It has also been held by the United States Supreme Court that matters resting exclusively on state law are binding on the United States Supreme Court. *Williams v. Kaiser,* 323 U.S. 471, 65 S.Ct. 363, 89 L.Ed. 398; *Chesapeake & O. R. Co. v. Public Service Commission,* 242 U.S. 603, 37 S.Ct. 234, 61 L.Ed. 520; *United Gas Public Serv. Co. v. Texas,* 303 U.S. 123, 58 S.Ct. 483, 82 L.Ed. 702.

These are questions of state law, questions having their origin within the framework of many years of adjudications in the Supreme Court of the State of Wisconsin. Consequently, we feel that the decision by the Supreme Court of Wisconsin in *Wisconsin Electric Power Co. v. Milwaukee,* 272 Wis. 575, 76 N.W. (2d) 341, rests on an adequate and substantial non-federal basis which the Supreme Court of the United States should not and cannot interfere with.

CONCLUSION

It is submitted that the question presented by this motion to dismiss should be decided in favor of the appellee, City of Milwaukee, in view of the fact that the case rests on an adequate non-federal basis and because of the fact that no constitutional question is involved in the case presently pending before this court.

Respectfully submitted,

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